

Decision 06-03-016

March 2, 2006

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Order Instituting Rulemaking to Implement the
California Renewables Portfolio Standard
Program.

Rulemaking 04-04-026
(Filed April 22, 2004)

ORDER MODIFYING DECISION (D.) 05-11-025 AND
DENYING REHEARING OF THE DECISION, AS MODIFIED

I. INTRODUCTION

In this decision we dispose of an application for rehearing filed by Pacific Gas and Electric Company (“PG&E”) of Decision (D.) 05-11-025 (“Decision”). In the Decision, we established the parameters for participation of energy service providers (“ESPs”), community choice aggregators (“CCAs”), and small and multi-jurisdictional utilities (“SMJU”) in the Renewables Portfolio Standards (“RPS”) Program. Among other things, the Decision determined that the Commission should further explore whether ESPs, CCAs and SMJU should be allowed to use short-term contracts (i.e., contracts of less than ten years in duration) to fulfill their RPS requirements.

PG&E filed a timely application for rehearing challenging the Decision on the grounds that: (1) the decision to not allow the Investor Owned Utilities (“IOUs”) to use short-term contracts is supported neither by the evidentiary record nor by findings and (2) the Decision is discriminatory by not permitting the IOUs to also use short-term contracts as a means of meeting their RPS requirements. Aglet Consumer Alliance filed a response opposing PG&E’s rehearing application.

We have carefully considered the arguments raised by PG&E and are of the opinion that it has demonstrated error with respect to our statement concerning ESPs and price sensitivity. Therefore, we shall modify the Decision to eliminate this statement. Rehearing of the Decision, as modified, is denied.

II. DISCUSSION

PG&E's evidentiary challenge centers around the Decision's statement: "The business of an ESP . . . is much more highly sensitive to price pressures than a utility, which has captive customers, at least at this time." (D.05-11-025, p. 13.) PG&E argues that the conclusion regarding price sensitivity is neither supported by the evidentiary record nor by adequate findings. Therefore, it maintains that the Decision errs by using this as a basis for concluding that ESPs should be allowed the opportunity to use short-term contracts to meet their RPS obligations. (Rhg. App., pp. 4-7.)

We agree with PG&E's argument that the record is lacking evidence with respect to price sensitivity. However, we still find that the record supports our determination that ESPs do operate under a different business model than IOUs and that, from a policy standpoint, should not be treated in the same manner as IOUs in their participation of the RPS Program, particularly with respect to contracting requirements.¹ For example, AReM noted that unlike the IOUs, ESPs are not assured recovery of their contract costs in customer rates. (*Opening [Comments] of the Alliance for Retail Energy Markets on Issues Identified in the Assigned Commissioner's Ruling and Scoping Memo ("AReM Opening Comments")*, filed January 18, 2005, pp. 7-8.) Additionally, it pointed out that ESP load could change significantly during the course of a year as a result of

¹ The record of this phase of the RPS Proceeding was developed through the filing of a single round of opening and reply comments. However, parties have titled these filings "briefs." Thus, to prevent any ambiguity, or confusion as to what constitutes the record, we have replaced the word "brief" with the word "comments," where appropriate.

changes in its customer base. (*AReM Opening Comments*, p. 8.) Therefore, AReM argued that requiring ESPs to enter into long-term contracts, without the assurance of cost recovery, would create severe financial hardship for such entities. (*Reply [Comments] of the Alliance for Retail Energy Markets on Issues Identified in the Assigned Commissioner's Ruling and Scoping Memo*, filed February 4, 2005, p. 4.) Further, suppliers of renewable energy recognized that ESPs may not be able to enter into long-term contracts with renewable producers. (*Opening [Comments] of the Green Power Institute on Phase Two of the Renewable Portfolio Standard Rulemaking*, filed January 18, 2005, p. 6, fn. 3.) Accordingly, to correct the error identified by PG&E, we shall eliminate the statement concerning price sensitivity and modify the Decision to explain how ESPs differ from the IOUs.

PG&E's other argument is that the Decision is discriminatory by not permitting IOUs the ability to enter into short-term contracts to meet their RPS obligations. (Rhg. App., pp. 3-4.) PG&E points to a statement on page 22 of the Decision which states that while further proceedings shall consider whether and the extent to which ESPs, CCAs and SMJU may use short-term contracts to fulfill their RPS requirements, the Commission "do[es] not intend . . . to entertain this option for large utility compliance with RPS requirements." (Rhg. App., p. 3, quoting D.05-11-025, p. 22.) This argument is without merit.

In order to demonstrate unlawful discrimination, PG&E must not only show that it was treated differently than ESPs, CCAs and SMJU, but also that it is either similarly situated to these entities or that the disparate treatment is not justified. (See, e.g., *Griffiths v. Superior Court* (2002) 96 Cal.App.4th 757, 775-76.) It has failed to do so in this instance. In fact, the record clearly demonstrates that the ESPs, CCAs and SMJU are not similarly situated to the IOUs. Further, in the Decision, we have explained our policy reasons why ESPs, CCAs and SMJU should not be subject to exactly the same requirements as the IOUs. (D.05-11-025, pp. 12-14.) These factors support our

conclusion that it was reasonable to further consider whether the ESPs, CCAs and SMJU should be treated differently with respect to contracting for renewable resources. Thus, we find no basis for granting rehearing on this issue.

While we find that PG&E's discrimination claim is without merit, it does raise a point that requires clarification. In *Order Initiating Implementation of the Senate Bill 1078 Renewable Portfolio Standard Program* ("RPS Implementation Decision") [D.03-06-071, p. 58 (slip op.)] (2003) __ Cal.P.U.C.3d __, we found no "good reason to permit the utilities to offer contracts of less than 10 years in duration." However, to the extent developers bid short-term contracts, they may be counted towards an IOU's RPS compliance requirements upon our express approval. (See *id.* at p. 58, fn. 52 (slip op.).) Our statement on page 22 of the Decision was intended to simply reiterate our determination in the *RPS Implementation Decision* that the IOUs may not offer contracts of less than 10 years in duration. However, it was not intended to foreclose the ability of the IOUs to use short-term contracts altogether to meet their RPS requirements should developers bid shorter-term contracts in response to the IOUs' offers.

With the above modifications, we find no grounds for granting PG&E's application for rehearing. Accordingly, rehearing of D.05-11-025, as modified, shall be denied.

Therefore **IT IS ORDERED** that:

1. Decision (D.) 05-11-025 is modified to delete the following sentence from the first full paragraph on page 13: "The business of an ESP, on the other hand, is much more highly sensitive to price pressures than a utility, which has captive customers, at least at this time."
2. The deleted sentence in Ordering Paragraph 1 above shall be replaced with the following sentence: "Unlike an IOU, an ESP faces more financial challenges to the recovery of costs from its customers."
3. Rehearing of D.05-11-025, as modified, is denied.

This order is effective today.

Dated March 2, 2006, at San Francisco, California.

MICHAEL R. PEEVEY
President
GEOFFREY F. BROWN
JOHN A. BOHN
RACHELLE B. CHONG
Commissioners

Commissioner Dian M. Grueneich recused herself from this agenda item and was not part of the quorum in its consideration.